

CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK (I-Bank)

STAFF REPORT

REQUESTED ACTION:

Staff requests approval of a revision to an existing I-Bank Board (Board) policy that specifies which statutorily eligible project costs may be reimbursed to Infrastructure State Revolving Fund Program (ISRF Program) project sponsors. Currently the Board's policy on cost reimbursement is more restrictive than required by Federal tax law. The requested action would conform to Federal tax law and is expected to result in more eligible project costs being financed through the ISRF Program.

BACKGROUND INFORMATION:

Pursuant to the authority of the Bergeson-Peace Infrastructure and Economic Development Bank Act (California Government Code Section 63000 et seq.) (Act), the I-Bank adopted Criteria, Priorities and Guidelines (Criteria) for a program to finance public development facilities known as the Infrastructure State Revolving Fund Program (ISRF Program).

The I-Bank is authorized under the Act and the Criteria to, among other things, finance the "costs" of the categories of "public development facilities" (Projects) located in the State, as requested by "sponsors" (Project Sponsors), all as defined in the Act, pursuant to the authority and requirements of the Act.

The Criteria requires that all Projects and Sponsors must be eligible for tax-exempt financing under federal law. Federal tax law identifies three general categories of costs that may be reimbursed with bond proceeds: preliminary costs (such as engineering, environmental, and project design costs); land acquisition costs; and, capital costs (hard construction costs). Both Federal tax law and Board policy establish when certain costs must have been paid in order for those costs to be eligible for reimbursement under the ISRF Program.

Currently, the Board's reimbursement policy is consistent with Federal tax law for preliminary costs and land acquisition costs. The proposed revision pertains only to "capital costs."

CAPITAL COST REIMBURSEMENT RELATED INFORMATION:

Tax Law Reimbursement Limitations. Federal tax law would allow ISRF Program financings to be used to reimburse capital costs incurred by the Project Sponsor within 60 days prior to the later of (1) the I-Bank's statement of official intent to issue bonds for the purpose of reimbursing costs (contained in the Board resolution approving the ISRF Program financing) or (2) the Project Sponsor's statement of official intent to use ISRF

Program Bond proceeds for the purpose of reimbursing costs (contained in the resolution of the Project Sponsor's legislative board included in the Project Sponsor's financing application for ISRF Program financing). No reimbursement may be made within 18 months after the later of (1) the date the costs were paid or (2) the date the project was placed in service, but no more than three years after the cost is paid.

I-Bank Policy Reimbursement Restrictions. Board policy has established limitations to the reimbursement of eligible capital costs in addition to those established by Federal tax law.

On June 9, 2000, the Board adopted Resolution 00-32, which prohibited the reimbursement of construction or asset purchase costs (e.g., capital costs) incurred prior to the execution of the ISRF Program financing agreement.

On February 24, 2009, the Board adopted Resolution 09-06, which authorized the reimbursement of those eligible capital costs incurred by the Project Sponsor on and after the date of I-Bank Board approval of the ISRF Program financing. Resolution 09-06 and the related Staff Report are attached for reference as **Attachment A¹**.)

The relevant portion of Resolution 09-06, including Section 2(c) related to capital costs, reads as follows:

Section 2. Costs paid by a Project Sponsor are eligible for reimbursement from ISRF Program financings, to the extent permitted by federal regulations pertaining to the reimbursement of costs from the proceeds of tax-exempt bonds ("Federal Tax Regulations"), as follows:

(a) The following "preliminary costs", subject to the aggregate amount limitation of the Federal Tax Regulations, notwithstanding when they were incurred or paid: costs of architectural, engineering, surveying, soil and environmental testing and reports, studies (including environmental impact, rate and feasibility studies), CEQA reports, the issuance of ISRF Program Bonds, and similar costs not including land acquisition, site preparation or similar costs incident to the commencement of construction.

(b) Costs of land acquisition and ISRF Program fees, to the extent paid within the time-limits established by the Federal Tax Regulations.

(c) All other project costs to the extent paid on or after the date of the adoption of a resolution by this Board approving the ISRF Program financing, or such later date permitted by the Federal Tax Regulations.

¹ As initially proposed by I-Bank staff, Resolution 09-06 would have amended and superceded Resolution 00-32 in its entirety. Following discussion at the February 24, 2009 Board meeting, Resolution 09-06 was limited in scope to amend only the reimbursement of costs policy.

The policy of reimbursing only capital costs incurred on or after the Board's approval of an ISRF Program financing was adopted for the purpose of conforming to the Criteria's requirement that ISRF Program loans only be approved for Project Sponsors evidencing a "need" for the financing. At the time of proposing Resolution 09-06, staff acknowledged that the use of ISRF Program funds as a replacement for funding otherwise available to the Project Sponsor was inconsistent with the Criteria's "need" requirement. However, the "need" requirement (Criteria Section 6.I.) does not actually require that a Project Sponsor prove that it is unable to pay capital costs without borrowing. Rather Criteria Section 6.I focuses on whether a Project Sponsor would otherwise have difficulty obtaining financing for the project. Criteria Section 6.I. is reads as follows,

Section 6.I. Need for I-Bank Financing

- A. Applicants requesting a loan for \$2 million or less are eligible to apply for I-Bank financing regardless of what the applicant's project credit rating is based on the credit strength of the loan's repayment source. Additionally, applicants with projects located in a jurisdiction that would receive the maximum points for unemployment, median family income or poverty as defined in Section 7.II.A, B, and D are eligible to apply for I-Bank financing regardless of what the applicant's project credit rating is based on the credit strength of the loan's repayment source.
- B. Applicants requesting financing in amounts between \$2 and \$10 million are eligible to apply for I-Bank financing if the applicant's loan repayment source is unrated or if it would not permit a Baa2/BBB or higher credit rating for the applicant's debt, indicating the applicant's limited access to capital. Applicants with a proposed repayment source that is rated Baa2/BBB or higher are presumed to have access to capital and therefore do not meet the I-Bank's "need for financing" criteria unless the applicant clearly demonstrates the reasons for the need for I-Bank financing. Such reasons could include the following: (1) inability to raise sufficient net proceeds for project requirements through market interest rate financing; (2) short-term, interim financing needs pending receipt of approved long-term funding; and (3) lack of other realistic, affordable financing alternatives.

By limiting the reimbursement of capital costs to those paid on and after the date of Board approval of the financing the policy articulated in Resolution 09-06 goes beyond the purpose of Criteria Section 6.I. Permitting the use of ISRF Program funds to reimburse capital costs incurred by Project Sponsors prior to the date of financing approval would not be inconsistent with Criteria Section 6.1.

PURPOSE FOR REQUESTED ACTION:

Following the adoption of Resolution 09-06, Staff has encountered Project Sponsors who met the need for financing requirement of the Criteria, and have incurred capital costs that are reimbursable under Federal tax law, but are not eligible for reimbursement under the policy established by Resolution 09-06. Additionally, some Project Sponsors have artificially delayed commencement of construction in order to assure that all capital costs they incur are eligible for ISRF Program financing.

The policy established by Resolution 09-06 is not required to meet the “need for financing” requirement of the Criteria or to conform to Federal tax law, and has unduly disadvantaged ISRF Project Sponsors, who are cash-strapped local governments.

PROPOSED REVISION:

The proposed revision to Resolution 09-06 is to delete the subsections, as follows:

Section 2. Costs paid by a Project Sponsor are eligible for reimbursement from ISRF Program financings, to the extent permitted by federal regulations pertaining to the reimbursement of costs from the proceeds of tax-exempt bonds. (“Federal Tax Regulations”), as follows:

~~(a) The following “preliminary costs”, subject to the aggregate amount limitation of the Federal Tax Regulations, notwithstanding when they were incurred or paid: costs of architectural, engineering, surveying, soil and environmental testing and reports, studies (including environmental impact, rate and feasibility studies), CEQA reports, the issuance of ISRF Program Bonds, and similar costs not including land acquisition, site preparation or similar costs incident to the commencement of construction.~~

~~(b) All other project costs Costs of land acquisition and ISRF Program fees, to the extent paid within the time limits established by the Federal Tax Regulations.~~

~~(c) All other project costs to the extent paid on or after the date of the adoption of a resolution by this Board approving the ISRF Program financing, or such later date permitted by the Federal Tax Regulations.~~

If approved, Resolution 10-29 will supersede Resolution 09-06 and all costs incurred by ISRF Project Sponsors will be eligible to be reimbursed from the proceeds of an ISRF Program financing if those costs are reimbursable pursuant to Federal tax law.

RECOMMENDATION: Staff recommends approval of Resolution 10-29 to permit ISRF Program funds to be used to reimburse eligible costs of public development facilities that are reimbursable pursuant to Federal tax law pertaining to the reimbursement of costs from the proceeds of tax-exempt bonds.

Attachment A – Resolution 09-06 and February 24, 2009 Staff Report

RESOLUTION NO. 09-06

RESOLUTION OF THE CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK INSTRUCTING STAFF REGARDING THE APPROVING THE FINANCING OF COSTS PAID OR INCURRED BY THE INFRASTRUCTURE STATE REVOLVING FUND PROGRAM PROJECT SPONSORS PRIOR TO THE EFFECTIVE DATE OF FINANCING AGREEMENTS.

WHEREAS, the California Infrastructure and Economic Development Bank (the “I-Bank”) is established pursuant to the Bergeson-Peace Infrastructure and Economic Development Bank Act (California Government Code Section 63000 et seq.) (the “Act”), for the purpose of promoting, among other things, a system of public improvements essential to the economic well-being of the citizens of the State of California (the “State”) and that are necessary to maintain, as well as create, employment within the State;

WHEREAS, the I-Bank is authorized under the Act to, among other things, finance the “costs” of the categories of “public development facilities” located in the State, as requested by “sponsors” (“Project Sponsors”), all as defined in the Act, pursuant to the authority and requirements of the Act;

WHEREAS, the I-Bank has adopted Criteria, Priorities and Guidelines (the “Criteria”) for a program to finance public development facilities known as the Infrastructure State Revolving Fund Program (the “ISRF Program”);

WHEREAS, the ISRF Program is funded in part by the issuance of bonds by the I-Bank (the “ISRF Program Bonds”), and the ISRF Program transactions that are either funded from the proceeds of, or pledged to the security of various series of ISRF Program Bonds must be structured in conformance with certain federal tax law requirements that apply to the ISRF Program Bonds and in conformance with certain contractual agreements made by the I-Bank in relation to the ISRF Program Bonds;

WHEREAS, the Board adopted Resolution 00-32 to, among other things, establish when a Project Sponsor may use the proceeds of an ISRF Program financing to reimburse costs incurred by the Project Sponsor prior to the execution of the ISRF Program financing agreement;

WHEREAS, the reimbursement limitations established in Resolution 00-32 are more stringent than required by the Act or the federal tax law or agreements pertaining to the use of proceeds of the ISRF Program Bonds, and from time-to-time have either inhibited the I-Bank’s ability to finance costs of a ISRF Program project that would have otherwise been eligible under the Act and the laws and agreements pertaining to the ISRF Program Bonds or have made it difficult for Project Sponsors to evidence their readiness to proceed within six months of receiving a financing commitment, as required by the Criteria;

WHEREAS, the Criteria express the Board's intention that the ISRF Program be used to finance public development facilities that are in need of ISRF Program financing, and the use of ISRF Program funds as a replacement for funding otherwise available to the Project Sponsor is inconsistent with this expression;

WHEREAS, the Resolution 00-32 also provides instructions to I-Bank staff as to how to interpret the Act's definitions of "public development facilities" and "public parking facilities" one of the categories of public development facilities, and how to identify a nonprofit corporation "formed on behalf of" a Project Sponsor;

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the California Infrastructure and Economic Development Bank, as follows:

Section 1. The Board hereby finds that the above recitals are true and correct.

Section 2. Costs paid by a Project Sponsor are eligible for reimbursement from ISRF Program financings, to the extent permitted by federal regulations pertaining to the reimbursement of costs from the proceeds of tax-exempt bonds ("Federal Tax Regulations"), as follows:

(a) The following "preliminary costs", subject to the aggregate amount limitation of the Federal Tax Regulations, notwithstanding when they were incurred or paid: costs of architectural, engineering, surveying, soil and environmental testing and reports, studies (including environmental impact, rate and feasibility studies), CEQA reports, the issuance of ISRF Program Bonds, and similar costs not including land acquisition, site preparation or similar costs incident to the commencement of construction.

(b) Costs of land acquisition and ISRF Program fees, to the extent paid within the time-limits established by the Federal Tax Regulations.

(c) All other project costs to the extent paid on or after the date of the adoption of a resolution by this Board approving the ISRF Program financing, or such later date permitted by the Federal Tax Regulations.

Section 3. This Resolution supersedes Section 4 of Resolution 00-32 adopted on June 9, 2000, and shall take effect from and after its adoption.

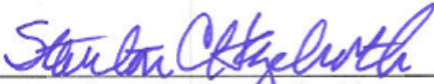
PASSED, APPROVED, AND ADOPTED at a meeting of the California Infrastructure and Economic Development Bank on February 24, 2009, by the following vote:

AYES: Bonner, Rockwell, Lujano, Rice


NOES: None

ABSENT: Marin

ABSTAIN: None

By 
Stanton C. Hazelroth, Executive Director

Attest:

By 
Roma Cristia-Plant, Secretary

February 24, 2009
Agenda Item 7

CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK (I-Bank)

STAFF REPORT

REQUESTED ACTION:

Staff requests permission to revise existing I-Bank Board (Board) direction as to what public development facilities costs are eligible for reimbursement in the Infrastructure State Revolving Fund Program. In addition, staff requests permission to restate and clarify existing Board instructions regarding the interpretation of certain definitions within Section 63010 of the Bergeson-Peace Infrastructure and Economic Development Bank Act (California Government Code Section 63000 et seq.) (Act).

BACKGROUND INFORMATION:

Pursuant to the authority of the Act, the I-Bank has adopted Criteria, Priorities and Guidelines (Criteria) for a program to finance public development facilities known as the Infrastructure State Revolving Fund Program (ISRF Program).

The I-Bank is authorized under the Act and the Criteria to, among other things, finance the "costs" of the categories of "public development facilities" located in the State, as requested by "sponsors" (Project Sponsors), all as defined in the Act, pursuant to the authority and requirements of the Act.

Reimbursement Related Information: The ISRF Program is funded in part by the issuance of bonds by the I-Bank (ISRF Program Bonds), and ISRF Program transactions must be structured in conformance with certain federal tax law requirements that apply to the ISRF Program Bonds and in conformance with certain contractual agreements made by the I-Bank in relation to the ISRF Program Bonds. In relation to the issuance of each series of ISRF Program Bonds, the I-Bank agrees to conform the ISRF Program financings to the applicable federal tax law.

Federal tax law limits the use of ISRF Program Bond proceeds to reimburse costs paid by a Project Sponsor prior to the issuance of the ISRF Program Bonds used to fund the Project Sponsor's ISRF Program financing. In general:

Up to 20% of each ISRF Program financing can be used to reimburse the Project Sponsor for "preliminary expenditures" notwithstanding when those "preliminary expenditures" were incurred or paid. For this purpose, "preliminary expenditures" include the costs of architectural, engineering, surveying, soil and environmental testing and reports, studies (including environmental impact, rate and feasibility studies), CEQA reports, the issuance of ISRF Program Bonds, and similar costs not including land acquisition, site preparation or similar costs incident to the commencement of construction.

February 24, 2009
Agenda Item 7

ISRF Program financings can be used to reimburse capital costs paid by the Project Sponsor within 60 days prior to the later of (1) the I-Bank's statement of official intent to issue bonds for the purpose of reimbursing costs (contained in the Board resolution approving the ISRF Program financing or (2) the Project Sponsor's statement of official intent to use ISRF Program Bond proceeds for the purpose of reimbursing costs (contained in the resolution of the Project Sponsor's legislative board included in the Project Sponsor's financing application for ISRF Program financing). No reimbursement may be made within 18 months after the later of (1) the date the costs were paid or (2) the date the project was placed in service, but no more than three years after the cost is paid.

Resolution 00-32, adopted on June 9, 2000, sets forth certain limits on costs eligible for reimbursement under the ISRF Program. Resolution 00-32 and the related Staff Report are attached for reference (see **Attachment A**).

Interpretation Related Information: The specific categories of "public development facilities" eligible to be funded pursuant to the ISRF Program are attached for reference (see **Attachment B**). Resolution 00-32 also a) sets forth the Board's direction for the interpretation of the definitions listed as "public development facilities", including when public parking facilities are eligible pursuant to the definition of "public transit", (b) delegates to the Board Chair the authority to determine whether a specific project is eligible under one or more of the "public development facilities" categories, and c) sets forth the Board's direction for the interpretation as to how a non-profit corporation sponsors can evidence that it has been "formed on behalf of" a Project Sponsor (see **Attachment A**).

Subsequent to Resolution 00-32, the Board has adopted Criteria that include the direction regarding "public transit" facilities.

To the recollection of I-Bank staff, it has never been necessary for staff to seek the guidance of the Board Chair as to how to interpret "public development facilities" categories. The determination as to whether a project is statutorily permitted is vested by the Legislature in the Board as a whole, and the Board exercises that authority every time it approves an ISRF Program financing.

PURPOSE FOR REQUESTED ACTIONS:

Reimbursement: The Criteria express the Board's intention that the ISRF Program be used to finance public development facilities in need of ISRF Program financing, and staff acknowledges that the use of ISRF Program funds as a replacement for funding otherwise available to the Project Sponsor is inconsistent with this expression.

However, due to reimbursement limitations set forth in Resolution 00-32, Project Sponsors have been limited in their ability to incur most capital costs prior to the execution of an ISRF Program financing agreement, which typically is 2 – 3 months following the Board's approval of the ISRF Program financing. In addition, from time-to-

February 24, 2009
Agenda Item 7

time the reimbursement limitations of Resolution 00-32 have either inhibited the I-Bank's ability to finance costs of a ISRF Program project that would have otherwise been eligible under the Act and the laws and agreements pertaining to the ISRF Program Bonds or have made it difficult for Project Sponsors to evidence their readiness to proceed within six months of receiving a financing commitment, as required by the Criteria.

Interpretation: In the interest of avoiding having a plethora of resolutions providing guidance on ISRF Program matters, staff is attempting to restate all of those provisions of Resolution 00-32 which have not already been restated in the Criteria, and, in the process or restating these provisions, to clarify them.

PROPOSED DIRECTION:

If approved, Resolution 09-06 will supersede Resolution 00-32.

Determination of Costs Eligible for Reimbursement:

If Resolution 09-06 is approved, capital costs will be eligible to be reimbursed from the proceeds of an ISRF Program financing if those capital costs are paid by the Project Sponsor on or after this Board's approval of the ISRF Program financing, which typically could mean 2-3 months earlier than allowed under Resolution 00-32. This will continue to restrict the use of ISRF Program financing proceeds to projects that are "in need" of ISRF financing, while at the same time assist Project Sponsors in determining their ability to proceed within six months of receiving a financing commitment.

In addition, the definition of what constitutes "preliminary costs" will be consistent with the definition of "preliminary costs" in federal tax law.

Direction for Interpretation of Statutory Definitions:

If approved, Resolution 09-06 will direct staff, for the purpose of determining whether a proposed ISRF Program financing should be brought to this Board for consideration, to broadly interpret the definition of public development facilities in the Act so as to include not only the categories of facilities specifically set forth in Government Code Section 63010(q), and the facilities specifically included as representative of each category of facility, but to also include facilities that appear to be rationally included within the stated categories of facilities. Resolution 09-06 includes one example related to interpreting the category of "Power and Communication" so as to include solar facilities. The example is not intended to be a limitation but rather one example of how to broadly interpret the separate categories.

Additionally, Resolution 09-06 will instruct staff for the purpose of interpreting the definition of "sponsor" pursuant to Section 63010(u), how to determine when a non-profit corporation is "formed on behalf of" a Project Sponsor.

February 24, 2009
Agenda Item 7

RECOMMENDATION: Staff recommends approval of Resolution 09-06 to revise existing Board direction as to what public development facilities costs are eligible for reimbursement in the Infrastructure State Revolving Fund program and to restate and clarify existing Board instructions regarding the interpretation of certain definitions within Section 63010 of the Act.